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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 176.

JOSEPH RADICE, PLAINTIFF IN ERROR,

vs.

PEOPLE OF THE STATE OF NEW YORK, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

CARL SHERMAN,
Attorney General,
Counsel for Defendant in Error.

IRVING I. GOLDSMITH,
Deputy Attorney General,
Of Counsel.

(29,308)

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I.

FACTS ABOUT RESTAURANT WORKERS.

In 1916 the Consumers' League of New York City, in co-operation with the Department of Health of New York City, studied the conditions of work of women employed in restaurants. This study was made because of the frequent complaints of women employed in restaurants.

It was undoubtedly on the findings of this report that the 1917 legislation was based.

The following facts are taken from this report, which was based on interviews with 1,017 women restaurant employees:

Data.	Significance.
Age of women employed in Restaurants. 69.2% under 30. 25.2% under 21.	Restaurant workers are young women.
Conjugal Condition 53% single. 33% married. (Of these 52% are under 30 years of age.) 11% widowed. 4% divorced.	A large proportion of the women restaurant workers are married and have home responsibilities. If they work at night time they must also take care of children throughout the day.
Living Conditions. 45% living with their family. 21% living with relatives. 16% living with friends. 14% living in furnished rooms. 4% living with proprietor.	A great majority of the women are living at home; even if they are not required to undertake home responsibilities they have their sleeping hours disturbed by members of the family.
Hours Worked. (1916) 78% of the full time workers employed more than 54 hours. 35% employed more than 60 hours. 4% worked at night.	Only a very small proportion of women worked at night before any regulation regarding night work was made.

The following extracts from the report are reprinted:

FOREWORD.

"I keep hearing about laws for women. Where are they?" This was the question asked by a woman working twelve hours a day in a restaurant. What must we tell her? What excuse have we to offer for excluding her from the protection the law gives to women working in factories and mercantile establishments? That we have safeguarded women in these fields of employment from overwork proves that we know the dangers of overwork, that long hours interpreted in terms of human life mean exhaustion, disease, immorality, pauperism and a weaker generation to follow our own. This is an old story, it has been told again and again. Yet with our over-sensitiveness to an encroachment upon the rights and liberties of American citizens, we have failed to extend the protection of our laws to all who need their protection.

The New York State Labor Law as it stands makes it illegal to employ women in factories and mercantile establishments more than fifty-four hours or six days in any one week, or between ten o'clock at night and six o'clock in the morning. So far, so good. If these laws are enforced, we may feel fairly confident that women in these branches of industry at least have some measure of protection. But what of the women not safeguarded by the law? Who are they, and why should they be neglected?

Between fifteen and twenty thousand of these women are workers in restaurants—waitresses, cooks, kitchen girls, pantry hands—upon whose services all of us depend at one time or another for our comfort and pleasure. The Consumers'

League of New York City has long felt the need of including restaurant workers under the provisions of the Labor Law. The State Department of Labor lays special stress upon this need. Believing, therefore, both from casual observation and from the statement of the Labor Department that women in restaurants are not properly guarded from industrial strain, the League planned to explore the field further, to discover just what actually are the hours, wages and general conditions of work in this branch of industry and to learn their effect upon the life and health of the worker.

A valuable study of this subject was made in 1910 by the United States Bureau of Labor Statistics for New York and several of the larger cities of the country. Though the Consumers' League has not entered upon wholly new ground, yet with adequate time for detailed study it has been possible for it to make a more exhaustive inquiry than any made heretofore, and to bring to light new phases of the question. The story of its discoveries is told in the pages that follow, to this end, that with wider knowledge of facts, public interest may be reawakened and stimulated to demand adequate legal protection for women employed in restaurants.

* * * * * * *

PLAN OF STUDY.

Believing that one of the most satisfactory sources of information in regard to labor conditions is the word of the workers themselves, the Consumers' League decided to base its study mainly upon interviews with restaurant employees. One thousand and seventeen (1,017) women were inter-

viewed in New York City and in six of the larger cities of the State. They were seen in their homes, at their places of employment and through employment agencies.

In New York City all the interviews were held at the Occupational Clinic of the Board of Health, where, through the courtesy of Dr. Harris, Chief of the Bureau of Industrial Hygiene, a room was set aside for the use of the League investigator. In response to a requirement of the Health Department, all food-handlers in the city come to the Clinic for a physical examination and certificate testifying that they are free from communicable disease. The investigator could in this way meet the women on neutral ground when there was no temptation to conceal or distort facts, and talk confidentially with them. The interviews taken at the Clinic in five months would have required at least a year to get in any other way.

The New York State Consumers' League and the branch leagues in Buffalo, Syracuse and Mt. Vernon co-operated in interviewing women in localities outside of New York City, and the same undesirable conditions were found to prevail throughout the State.

Supplementary information was also obtained from all other available sources, such as employers, employment agencies, girls' clubs and published reports. The workers came from every kind of restaurant, including hotels, tea-rooms, buffet and dairy lunches, cafeterias and clubs. In this way it was possible to get in touch with a thoroughly representative group of workers, including the best paid as well as the most underpaid.

In undertaking the investigation, the League sought to answer three questions: first, what are the actual conditions

of labor prevailing in the restaurants of New York State? second, are these conditions such that the worker may lead a wholesome, normal life? and third, how do these conditions react through the individual worker upon society as a whole?

* * * * * * *

NIGHT WORK AND ONE DAY'S REST IN SEVEN.

Although the number of women employed in restaurants at night is not great, night work in this occupation is a factor to be seriously considered. The restaurants which employ women at night are the small establishments in the tenement districts of the city where hours are longest and surroundings most trying; the cheaper restaurants in the theatre districts where the employment of women is an added attraction to after-the-theatre supper parties; and restaurants in railway stations which are necessarily open all night.

The law makes it illegal to employ women in factories and mercantile establishments between 10 p. m. and 6 a. m. The reasons which caused the State to exercise its police power to safeguard the health and morals of these classes of workers apply equally to the employment of women in restaurants. The very fact that *only four per cent* of the workers interviewed were employed at night proves that night work for women in restaurants is not a necessary evil. That it is an evil is beyond question.

The dangers of night work are two-fold. First, it is a distinct menace to the health of the worker. The Factory Investigating Commission in its report to the Legislature for 1913, states: "The chief danger to health from night work is * * * due to the inevitable lack of sleep and sun-

light. Recuperation from fatigue takes place fully only in sleep, and best in sleep at night. Hence night work is, in a word, against nature. This injury to health is all the greater because sleep lost at night by working women is never fully made up by day. For, in the first place, sleep in the day time is not equal in recuperative power to sleep at night. * * * Moreover quiet and privacy for sleep by day is almost impossible to secure. Upon returning home in the middle of the night or at dawn the workers can snatch at most only a few hours' rest."

Often a woman will have one week of night work alternating with a week of work in the day time. She hardly gets accustomed to sleeping by day when she is taken off the night shift, to change back again at the end of the week. Thus it is impossible for her to form regular habits in sleeping and eating.

Secondly, there is a grave moral danger involved in night work, especially for restaurant workers since at this time they are open to the attentions of an undesirable class of men. "I don't like to work at night," one young waitress said. "The men are always fresher to girls at night than in the day time. Perhaps it's because so many of those gamblers come in drunk." Nor is it safe for a woman to go home alone after twelve o'clock at night. Instances of hideous occurrences are familiar to everyone. A little widow, the mother of seven children, told the investigator that she had given up her work as a dishwasher for this very reason. A friend of hers working in a near-by restaurant was set upon, robbed and killed on her way home from work late one night. "I changed my work then," said the woman, "for what would the children do if anything happened to me?"

The majority of restaurants employ men for night duty. It is evident, therefore, that the employment of women is not essential to the convenience and comfort of either restaurant owners or customers.

In nearly every branch of industry the working week is six days long. It is universally conceded that there must be one day in the seven for rest and relaxation if men and women are to give their best service. With restaurant workers, thirty-three per cent of whom have no day of rest in seven, the need for such a time is particularly great because of the long working day. Otherwise they have no opportunity for a thorough rest and the poisons of fatigue are not thrown off. If these poisons are not eliminated, they accumulate in the system and finally result in physical breakdown.

And not only is this free day important on the score of health, but it is also the time for recreation and the strengthening of family ties. For the girl who has no leisure, no time for real relaxation and play, there is only a starved and empty existence. A woman who has no opportunity to be with and to know her children, who must leave them to the care of friends or a day nursery or the street, who has no day in the week to be at home with them, can hardly be a potent factor in shaping their lives. She suffers and so do the children, and the stability of such a family life is at best uncertain. One woman said, "If I get a half day off on Sunday to be with my children, it makes me happy all the week."

* * * * * * *

SUMMARY OF STUDY.

The law has declared illegal the employment of women in mercantile establishments longer than fifty-four hours or six days in any one week, on the ground that a working day of more than nine hours, or a working week of more than six days, is prejudicial to the health of the worker and therefore to the welfare of society. It has also declared illegal the employment of these women at night and it safeguards their interests further by insisting upon a definite period for the mid-day meal. Fifty-eight per cent (58%) of the women employed in restaurants exceed the fifty-four hour limit, twenty per cent (20%) work twelve hours a day and four per cent (4%) are employed at night. One-third do not have one day of rest in seven, and the majority are not allowed time off for their meals. Do not these women also need the protection of the law?

Restaurant work has much in common with work in mercantile establishments. Continuous standing and walking and the nervous strain entailed in serving many customers are features of both occupations. Besides this, restaurant work necessitates the lifting and carrying of heavy weights which may easily be disastrous not only to the worker herself, but to her children. Dr. Harris has expressly stated his belief that such work will injure the reproductive organs of a woman unless she is guarded from overstrain. The larger proportion of restaurant workers are girls and young women, who are peculiarly susceptible to overstrain because of their youth.

There is abundant evidence from the testimony of the girls themselves that restaurant work is a severe tax and that the

need for limiting hours of labor is strongly felt among them. Here are quoted a few of the remarks made by them, which could be duplicated many times:

> "I think it's a shame to let a woman work twelve hours a day. I'm so tired at night I can't do anything but go to bed."
>
> "I can't keep a job longer than four months because I get so nervous."
>
> "This is my second week and I'm nearly dead, the hours are so long."
>
> "It would be the grandest thing in the world if they could do away with the twelve-hour day."

To resist the unavoidable strain of the work, the restaurant worker must be in a normal, healthy state of mind and body. Our responsibility lies in seeing to it that conditions are such as to make this possible.

The results of fatigue do not end with the individual. It is common knowledge that health depends upon the power to resist disease. The person who has overworked is not only subject to the devastating action of fatigue poisons, but is a prey to any infections to which he may be exposed because he cannot throw them off. Working conditions which render large numbers of men and women susceptible to disease, and hence capable of spreading it, are a public menace. To allow such conditions to continue unchecked is inexcusable negligence.

These facts point directly to the crying need for the limitation of hours for women in restaurants, that the individual worker may be protected from overstrain, that the community may be guarded from the spread of contagious disease by people predisposed to infection through fatigue, and

that the children of these women may be strong and capable of becoming useful citizens.

It must be conceded that the difficulty of regulating hours in restaurants is much greater than in mercantile establishments. Restaurants must be open for a longer period each day than any store needs to be or is likely to be. But the difficulties are not insuperable. By working the employees in shifts of nine consecutive hours a day and six days a week, *and by replacing women by men for night duty*, the most undesirable features of restaurant work would be abolished. Such a plan has already been tried successfully in a number of New York restaurants, proving that it is possible and feasible to regulate hours.

To limit by law the hours of labor for women employed in restaurants cannot be considered a new or revolutionary step. New York is already far behind the majority of other States in this respect. At the present time, twenty-seven States regulate the number of hours that women may work in restaurants, five having the eight-hour day. Clearly, therefore, the establishment of a normal working day for this class of workers is not only reasonable, but, in the opinion of the greater number of States, it is essential to the best welfare of their people as a whole.

* * * * * * *

RECOMMENDATIONS FOR LEGISLATIVE AMENDMENT.

In view of the evidence brought to bear upon the subject, The Consumers' League wishes to urge the inclusion of women restaurant workers under the Mercantile Law, the general provisions of which are:

(1) That the working day shall not exceed nine (9) and the working week fifty-four (54) hours.

(2) That women shall not be employed between the hours of 10 p. m. and 7 a. m.

(3) That there shall be one day of rest in seven, and

(4) That there shall be a regular time off each day for meals.

WOMEN WORKERS IN RESTAURANTS ARE SUBJECT TO THE SAME HEALTH HAZARDS AS WORKERS IN FACTORIES OR MERCANTILE ESTABLISHMENTS AND SHOULD COME UNDER THE SAME PROTECTIVE LEGISLATION.

1. They work indoors and under similar environment.

   a. Like the factory workers they are employed in rooms necessarily noisy, which are likely to be overheated and artificially lighted.

   b. In addition, like the mercantile workers, they are employed in rooms crowded with people.

2. Their process of work is comparable.

   a. Like many factory workers, the restaurant worker must carry heavy trays, she must walk long distances and she is almost constantly on her feet. Even in her "slack" time she is folding napkins or shining silver, processes very similar to many factory operations.

The following additional information is submitted:

STATISTICS ON WAITRESSES—1910 and 1920.*

Before and after the prohibiting of night work for women restaurant employees.

Census statistics for New York State.	Trend.	Conclusions.
Number of Waitresses. 1910 — 15,163 1920 — 16,205	An increase of 1,042 or 6 per cent in the *number* of women taking waitress jobs.	In spite of the passage of the law prohibiting night work for women, the *number* of women taking waitress jobs has increased and the *proportion* of women so employed has remained practically the same.
Proportion of waitresses to total number of wage-earning women. 1910 — 1.5 per cent 1920 — 1.4 per cent	There has been practically no decrease in the *proportion* of women taking waitress jobs.	
Relation of women taking waitress jobs to entire Domestic and Personal Service Group: 1910 — 1920 No. in Domestic & Personal *Service Group.* 322,969 — 263,468 *Waitresses.* 15,163 — 16,205 Proportion of waitresses to entire Domestic and Personal. *Service Group.* 1910 — 4.7 per cent 1920 — 6.2 per cent	Decrease of approximately 60,000 in *number* entering Domestic and Personal Service Occupations. This large decrease was mainly from the servant group; the *number* of women taking waitress jobs had increased approximately 1,000. Of the total number of women entering domestic and personal service occupations, there has been an increase in the *proportion* taking waitress jobs.	The large decrease in employment in Domestic and Personal Service Occupations is shown among the servant group upon whom no legal restrictions have been placed, while there has been an increase in employment among waitresses in spite of night-work prohibition.

Age of Waitresses.*

Statistics for United States.		Conclusions.
Under 19 Years.	*Under 24 Years.*	Waitresses are a young group of workers, with 20 per cent under 19 years and almost half under 24 years of age.
Waitresses 20.5%	45.8%	
Waiters 8.8%	25.3%	Men waiters on the other hand are an older group of workers with only 8 per cent under 19 years and 25 per cent under 24 years.

*U. S. Census of Occupation, 1910 and 1920.

b. In addition to these processes, comparable to the heaviest factory work, the restaurant waitress like the clerk in the mercantile establishment must act as saleswoman.

1. As her income is largely dependent upon tips, it is even more important that the waitress please her customer than that the mercantile clerk offer good service to the prospective buyer.

3. Their work is rushed and done under high pressure.

a. The restaurant worker's income like that of the factory piece worker, is dependent on speed.

b. Like the mercantile worker, the restaurant employee is being hurried by impatient customers and has "rush hours," when her work is done under the highest pressure.

4. The accident hazards are similar.

a. A study of women's work accidents being made by the Bureau of Women in Industry shows a considerable proportion of the accidents occurred to women employed in restaurants:

> The accidents were burns, cuts, and sprains and the causes given are "hurrying at work," "slipped," "dropped hot dish," etc., causes which indicate the part fatigue plays in accidents occurring in restaurants.

The accident insurance rate for all restaurant workers is *61 cents* on $100.

The accident insurance rate for all retail store sales-persons is *42 cents* on $100.

JUSTIFICATION OF THE EXEMPTION OF CERTAIN FEMALES EMPLOYED IN RESTAURANTS AS SPECIFIED IN SECTION 182 OF THE LABOR LAW.

1. The exemption of females employed as singers and performers is justified because they are in a totally different class from the regular restaurant employees; their status is more nearly professional; moreover their work is not continuous nor physically exacting in the same way as that of the regular employees.

2. Females employed as attendants in ladies' cloak-rooms and parlors are legitimately exempted from the scope of the law, since they also are not continuously employed nor at the hard and exacting work of the regular employees. Moreover, since the exemption is limited to "ladies' cloak-rooms and parlors," the places of such attendants could obviously not be filled by men at night, as can the places of regular restaurant employees, if necessary.

3. Females employed in or in connection with the dining-rooms and kitchens of hotels are also justifiedly exempted from the scope of the act, owing to the different character of hotel employment; the fact that girls and women for the most part live on the premises differentiates them legitimately from girls and women who live at home and have to go home at a late hour from their restaurants.

4. Females employed in or in connection with lunch-rooms or restaurants conducted by employers solely for the

benefit of their own employees do not come within the scope of this act, because they are obviously included in the factory or mercantile act, having the same closing hour.

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BRIEF FOR DEFENDANT IN ERROR.

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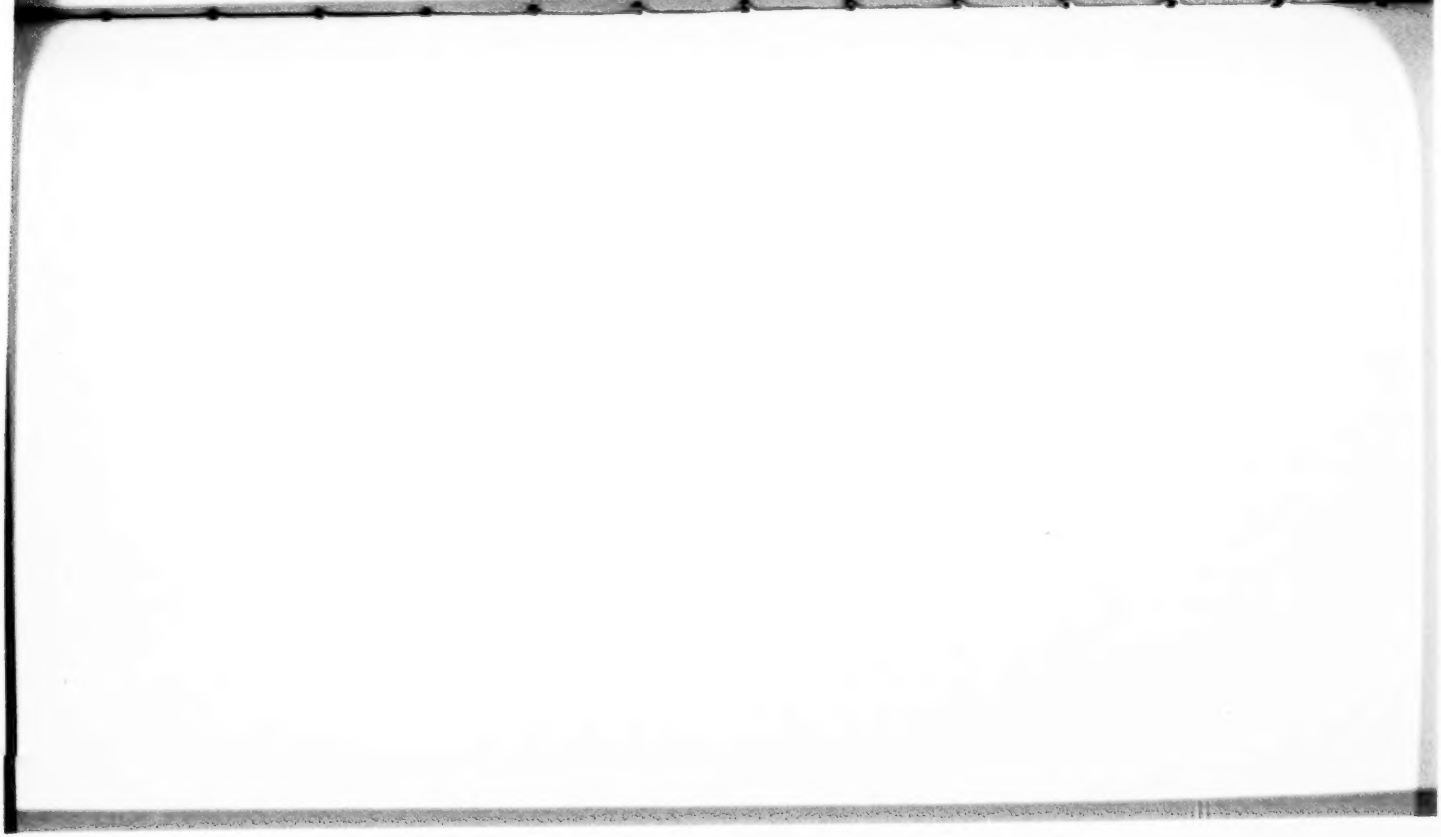

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BRIEF FOR DEFENDANT IN ERROR.

Statement.

The question presented for determination by the Writ of Error in this case is the constitutionality of Chapter 535 of the New York Laws of 1917, adding Subdivision 3 to Section 161 of the Labor Law, constituting Chapter 31 of the Consolidated Laws of the Sate of New York, providing that:

> "In cities of the first and second class no female over the age of sixteen years shall be

employed, permitted or suffered to work in or in connection with any restaurant more than six days of fifty-four hours in any one week, or more than nine hours in any one day, or before six o'clock in the morning or after ten o'clock in the evening of any day. This subdivision shall, however, not apply to females employed in restaurants as singers and performers of any kind, or as attendants in ladies' cloak rooms and parlors, nor shall it apply to females employed in or in connection with the dining rooms or restaurants conducted by employers solely for the benefit of their own employees."

This action was brought by the State Industrial Commission charging the defendant with a violation of said statute.

The defendant was arraigned in the City Court of Buffalo on December 18, 1917, and a trial of the action was commenced on January 29, 1918. Judgment convicting the defendant of Violation of said statute, imposing a fine of twenty ($20) dollars, was made and entered by said City Court of Buffalo, on the 15th day of October, 1918.

Thereafter and on December 2, 1918, defendant's appeal from said judgment of conviction to the County Court of Erie County was duly allowed, and thereafter and on the 26th day of March, 1919, said judgment of conviction was duly affirmed by said County Court of Erie County, and on said day such judgment of affirmance was duly filed in the Erie County Clerk's Office.

Thereafter and on July 25, 1919, said defendant duly appealed to Supreme Court, Appellate Division, Fourth Department, from the judgment of said County Court of Erie County made and entered on the 26th day of March, 1919, affirming the judgment of said City Court of Buffalo, convicting said defendant of such violation.

On May 3rd, 1922, said Appellate Division made its order affirming said judgment of conviction, which said order was duly entered.

Thereafter on May 17th, 1922, said Appellate Division made and entered its order whereby said Court certified that in its opinion a question of law is involved herein which ought to be reviewed by the Court of Appeals and thereafter and on May 18th, 1922, defendant duly appealed to the Court of Appeals from said judgment of conviction and said judgment of affirmance.

The Court of Appeals, the highest court of law and equity of the State of New York, thereafter affirmed said judgment of conviction and remitted the record to the City Court of Buffalo and said City Court of Buffalo made the judgment and order of said Court of Appeals, the judgment of said City Court by order made and entered on August 30th, 1922.

This case comes to this Court upon Writ of Error issued to said City Court upon said judgment.

FACTS.

Briefly the facts in this case are as follows:

Inspector Johnson of the State Industrial Commission visited the restaurant of the defendant at 635 Main Street, Buffalo, Erie County, New York, on November 10, 1917, conducted under the name of T. R. & C. Restaurant. He there found at work, acting as waitress, at 11.03 o'clock p.m., one Anna Smith, an adult woman. These facts, coupled with the fact that the premises conducted by the defendant was a restaurant pure and simple, open to public generally, and not a hotel in any sense, constitute the People's case.

The statute (Chapter 535 of the Laws of 1917) constituting subdivision 3 of Section 161 of Article 12 of the Labor Law, specifically forbids the employment in cities of the first and second class of any woman over the age of 16 years in or in connection with any restaurant before six o'clock in the morning or after ten o'clock in the evening of any day. It will, therefore, be seen from a reading of the above facts, which are admitted by the plaintiff in error, that a violation of the statute was presented to the Court by the People.

The defense interposed no testimony disputing the People's case but compiled a record which might be best described as largely composed of mitigating and explanatory circumstances.

POINT I.

This statute constitutes a valid exercise of the police powers of the state and is a constitutional enactment.

The statute involved is as follows:

> "Sec. 161. HOURS OF LABOR OF MINORS AND WOMEN:
>
> TIME FOR MEALS. * * * 3. In cities of the first and second class no female over the age of sixteen years shall be employed, permitted or suffered to work in or in connection with any restaurant more than six days of fifty-four hours in any one week, or more than nine hours in any one day, or before six o'clock in the morning or after ten o'clock in the evening of any day. This subdivision shall, however, not apply to females employed in restaurants as singers and performers of any kind, or as attendants in ladies' cloak rooms and parlors, nor shall it apply to females employed in or in connection with the dining rooms and kitchens of hotels, or in connection with lunch rooms or restaurants conducted by employers solely for the benefit of their own employees."

It will be seen at once that the facts brought out by the People show a violation of the law, and therefore, demanded the conviction of the plaintiff in error.

Admittedly this statute either stands or falls under the police powers of the State, and it is, therefore, in point to examine the trend of the decisions upon similar statutes in the State of New York and other jurisdictions in order to determine whether or not the Legislature exercised properly, in this instance, its police powers. We believe that it did and confidently call the attention of the Court to decisions hereinafter quoted.

Before, however, touching on these decisions a brief resume of the general testimony given on behalf of the plaintiff in error is desirable.

Starting from the point above referred to at which the People concluded their case, to wit: with the full proof of a violation of the statute, the defense offered in no way attacks the people's case. It is hardly necessary to mention this as the facts of the People were frankly admitted by the plaintiff in error and his evidence was given with the view of explaining or showing extenuating circumstances. The general testimony of the witnesses of the defense came from restaurant proprietors, restaurant managers, officials connected with restaurants and hotels and from waitresses, either in the actual employ of the plaintiff in error or employed in other restaurants.

Without attempting to quote the individual testimony of the numerous witnesses called for the plaintiff in error, it is safe and fair summing up of their testimony to say that all it amounted to was the general testimony upon their part and in their opinion that the employment of women as waitresses, or in connection with restaurants as

dishwashers, cooks, etc., after ten o'clock at night and before six o'clock in the morning, or during the night shifts covering said period, was not detrimental to their health. *It is opinion evidence in every individual instance.* Its value so far as being conclusive is concerned may readily be gathered from the fact that restaurant keepers, restaurant managers, and waitresses were called upon to testify gravely upon the subject of the effect upon the health of women of night work. It is clear that none was an expert and that such testimony was simply opinion testimony and from the point of view of medical worth, was absolutely worthless. It further was not to be expected that any one of these witnesses called by the defense would testify, when called to build up a case along these lines, that such work was detrimental to the health of women.

In other words, the entire testimony of these witnesses was testimony of self-interest and naturally biased. In addition to the above opinion testimony the defense called one Dr. Hopkins, a practicing physician of fifty years standing, who testified that, in his judgment, night work for women was beneficial. This was his direct testimony and would so stand upon the record had there been no cross-examination. On cross-examination, however, Dr. Hopkins was obliged to confess that he had never made a special investigation of the general subject of night work upon women and that he testified largely from a comparatively small number of instances where he had treated patients who performed such service.

He further was compelled to make the very damaging admission as far as the value of his direct testimony was concerned, that when he said that night employment for women was beneficial, he did not mean that, but that employment was the beneficial feature because everybody was benefited by being kept busy.

It will be seen that in view of this admission his entire testimony weighs but little. He having been called by the defense as an expert witness, his testimony falls because it does not appear to be the testimony of an expert upon the subject on which he was called to testify.

While it did not under the decisions and in view of the history of the making of this statute appear necessary to controvert by direct testimony what Dr. Hopkins had attemped to testify to, the People did call in rebuttal Dr. Bell, a physician connected with the Bureau of Industrial Hygiene of the State Industrial Commission, who testified categorically opposite. This testimony is not extensive and as stated above, was hardly deemed necessary to be placed in the record in view of the fact that the courts will take judicial notice of the volume of testimony along these lines, which was in the hands of the Legislature at the time the night work statutes were enacted. (*People vs. Charles Schweinler Press*, 214 N. Y. 395).

The statute stands or falls as above stated, under the police powers of the State. There can be little or no dispute about this. That which was legal before the enactment of the statute has be-

come illegal and only the exercise of the police powers of the State can justify such a change.

Indirectly this statute found its origin in the celebrated Triangle Waist Fire, which took place in New York City in 1911, and resulted in the loss of one hundred and forty-six lives. The Legislature, aroused by the event and made to realize that similar dangers existed in other factories, created an investigating commission known as the New York State Factory Investigating Commission for the purpose of inquiring into conditions under which manufacturing was being carried on in cities of the first and second class in the state. This commission carried on extensive investigations throughout a period of two years and more and in its scope dwelt not merely upon safety conditions and sanitary conditions in their relations to the health of operatives but *also extended its activities to the general subject of the health and welfare of employees themselves.* Along the latter line a considerable volume of testimony was taken in relation to the effect of factory work upon female employees and the report itself went into, to considerable extent, the general subject of the effect of night work upon women. The report, which comprised several volumes, was made to the Legislature with recommendations for legislation and in addition to the general improved safety regulations written upon the books at its instigation, the Investigating Commission also succeeded in placing upon the books, in addition and in accordance with its recommendations, a new section forbidding the em-

ployment of women in factories after ten o'clock at night or before six o'clock in the morning. This was known as Section 93b of the Labor Law and reads as follows:

> "Section 93-b. PERIOD OF HOURS AT NIGHT FOR WOMEN.—In order to protect the health and morals of females employed in factories by providing an adequate period of rest at night, no woman shall be employed or permitted to work in any factory in this state before six o'clock in the morning or after ten o'clock in the evening of any day."

This statute was, as stated above, enacted as a result of the direct recommendation of the State Factory Investigating Commission and the Legislature in enacting it did so with an exhaustive report spread before it showing the evil effects of night work upon the health of women.

The attention of the court may well and fairly be directed to this report and it may take judicial cognizance of it. (*People vs. Charles Schweinler Press*, 214 N. Y. 395 404.)

> "In the decision by the Legislature whether it should adopt such legislation, and in the determination by us whether the legislature was justified in adopting it, that body was and we are entitled to take into account the report made by the Commission, such facts tending to support it as were matters of common knowledge, and the widespread and long-

continued belief evidenced by statutes and in other manners that night work by women in such a place as a factory is so injurious that grave dangers therefrom are to be apprehended."

In that report, Mr. George M. Price, M.D., Director of Investigation, in his general remarks (reported in the 2nd Volume of the Factory Investigating Commission, 1913, at page 439) said:

"Next to child labor, night work of women is the greatest evil of modern industrial life. The participation of women in industry, although so general, has never been regarded as an entirely normal condition of society. When the participation of women in industrial life is carried on under abnormal conditions which endangers their health and lives, thus constituting a menace to future generations, such industrial participation must be regarded as an economic and moral injustice.

"All regular night work is inimical to health. This subject was discussed at length in the inquiry in to the evil effects of night work upon the health of bakers, published in the preliminary report of the commission. It was there stated that such work upsets the customs of normal life, banishes the workman from social life and greatly increases the morbidity and mortality of the workers. If habitual night work so impairs the health of men, its injuries effects upon woman are

obviously more far-reaching, and society is culpably negligent in permitting work of this kind to continue.

"The effect of night work on women has been a matter of discussion and agitation abroad for a number of years. In Germany the factory inspectors have demonstrated the high mortality rate among female night workers. The French Commission of 1890 found a high infant mortality among the children of women night workers.

"The objections to night work of women are many. Among the principal ones are the following: Lack of sunlight; lack of normal sleep; no compensation in the restless interrupted sleep of day for the sleeplessness of night; the abnormality of sleeping by day; abnormal change in daily life; the destruction of home life; impossibility of properly caring for home and children; lack of restraining influences; day work besides the arduous night tasks.

"It has even been claimed that night work is economically unnecessary, and does not compensate for the evils which result from it. Night work of men is prohibited in a number of Continental countries. As the law relates to bakers, night work is prohibited in Italy and Sweden, in certain cantons of Switzerland, and in several other countries.

"In 1902, a Commission was appointed by The International Association for Labor Legislation, to devise means for securing the in-

ternational prohibition of night work for women. Representatives from fourteen European powers were assembled at Berne, Switzerland, on September 26, 1906. By January 14th, 1907, the following countries, viz:

"Austria-Hungary, Belgium, France, Germany, Great Britain, Italy, Luxemburg, Portugal, Sweden, Switzerland, and the Netherlands, had ratified the provisions of the Commission that a minimum period of eleven consecutive hours set for the duration of the night rest, to include the time between 10 p. m. and 5 a. m. in all cases.

"According to the August, 1912, Bulletin of the International Labor Office, the following countries have already passed laws prohibiting night work of women: Austria-Hungary, Belgium, France, Germany, Great Britain, Italy, Luxemburg, Portugal, Sweden, Switzerland and the Netherlands. It is also said to be forbidden in Bulgaria, Algeria and Tunis. Proposed bills for its prohibition have been introduced in Spain and Denmark.

"The United States did not take part in the Berne Convention, since the government cannot bind separate States to enact legislation restricting the hours of labor. In some States of the Union, there is even a direct legalization of the night work for women. Thus in Wisconsin in 1911, a bill was passed legalizing an eight-hour shift for women, between 8 p. m. and 6 a. m. A similar law was passed in Connecticut in 1908, and bills

"lack of sunlight; lack of normal sleep; no compensation in the restless interrupted sleep of day for the sleeplessness of night; the abnormality of sleeping by day; the abnormal change in daily life; the destruction of home life; impossibility of properly caring for home and children; lack of restraining influences; day work besides the arduous night tasks."

(See *the Matter of Hamlin* 226 N. Y. 407, 414).

Could two statutes more completely similar in their general provision of more completely similar in their general intent or in their basis of conception by the Legislature be found.

The argument of counsel that the Investigating Commission did not recommend such legislation at the time of its reports is of little weight. The report on night work was as much before the Legislature in the year 1917 as it was in the year 1913, when first filed with it. In 1915, the Legislature again indicated its attitude in reference to night employment of women and extended to them by Chapter 386 of the Laws of 1915 the same protection—this time in reference to employment in mercantile establishments. Chapter 386 of Laws of 1915 amended Section 161 of Article 12 of the Labor Law to read as follows:

"No female employee over the age of sixteen years shall be required, permitted or suffered to work in or in connection with any *mercantile establishment* more than six days

or fifty-four hours in any one week or more than nine hours in any one day, except that one day in each week may be longer than nine hours for the purpose of making one or more shorter working days in the week: *or before seven o'clock in the morning or after ten o'clock in the evening of any day.* * * * "

This statute, it will be noted, was enacted two years after Section 93-b was. It was promptly made the subject of a challenge as to its constitutionality in the case of *People ex rel John Krohn v. Warden and Keeper of City Prison, Brooklyn,* reported in 215 N. Y., 701, wherein the *statute was sustained upon the opinion written in People vs. Charles Schweinler Press (supra.)* The same features existed in respect to the general forbidding of the employment of women to work in mercantile establishments at night as exist in the case at bar. Their work was indoor work; their work was at night; and the objectionable features of night employment, as summed up in the Investigation Commission's report to the Legislature (*supra*), existed with respect to mercantile establishments. Certainly the work required in mercantile establishments after ten o'clock at night would not seriously be held to be more difficult than that required of waitresses and employees in restaurant kitchens and yet the courts did not hesitate to sustain such legislation as constitutional.

In the case *People ex rel John Krohn vs. Warden and Keeper of City Prison,* 215 N. Y., 701

(supra), the appeal was from an order of the Appellate Division of the Second Department affirming an order of Special Term dismissing a writ of habaes corpus. The question on appeal was "Can a woman of full age be prevented by statute from working after 10 p. m. at night and before 7 a.m. in the morning in mercantile establishments in this State?" The order was "Affirmed on authority of *People vs. Charles Schweinler Press*, 214 N. Y. 305."

The striking feature of all this is—the similarity between the two statutes and that the action of the Legislature was promptly approved in each case by the court. In the latter case the court upheld on its Schweinler Press opinion. This is important as the two statutes differed in the places to which they applied, much more than the latter Chapter 386 of the Laws of 1915 does from the statute at present at bar.

We respectfully urge the Court to carefully examine the entire opinion in the case of *People vs. Charles Schweinler Press*, 214 N. Y., 395. That opinion is enlightening as to the case at bar, it covers the entire field, it meets every contention raised by the plaintiff in error, it cites the basis of the Legislature's action, and affirms its action as wise and a proper exercise of its powers. When it is again realized that the same Court upheld as constitutional the Legislature's next enactment of two years later in relation to the same kind of action, namely, the employment of women after 10 p. m. in mercantile establishments and furthermore "affirmed on the authority of *People vs.*

Charles Schweinler Press, 214 N. Y., 395," can it be seriously questioned that this, the statute in question, cognate in matter and thought, is constitutional? It would seem not.

In defining the police powers of a State, Mr. Justice Brown said in *Lawton vs. Steele,* 152 U.S., 135, 137:

> "The extent and limits of what is known as the police power have been a fruitful subject of discussion in the Appellate Courts of nearly every state in the Union. It is universally conceded to include everything essentian to the public safety, health and morals, * * * Beyond this, however, the State may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the Legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. *Barbier vs. Connolly,* 113 U. S., 27 (29, 32); *Kidd vs. Pearson,* 128 U. S. 1 (32, 46)."

Again in *Lochner vs. N. Y.,* 189 U. S. 45, Mr. Justice Holmes language in his dissenting opinion is in point:

> "It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which

equally with this interfere with the liberty to contract Sunday laws and usuary laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes its money for purposes thought desirable whether he likes it or not. The Fourteenth Amendment does not exact Mr. Herbert Spencer's Social statics. The other day we sustained the Massachusetts vaccination law, *Jacobson vs. Massachusetts*, 197 U. S. 171. United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court. *Northern Securities Co. vs. United States*, 193 U. S., 197. Two years ago we upheld the prohibition of sales of stock on margins or for future delivery in the Constitution of California. *Otis vs. Parker*, 187 U. S. 606. The decision sustaining an eight hour law for miners in still recent *Holden vs. Hardy*, 159 U. S. 366."

This statute is not class legislation.

Plaintiff in Error claims the legislation under review is unconstitutional on the ground that it is class legislation. No one will contend that the legislature cannot make a law limited in its appli-

cation, for such action is taken by it constantly. The mere fact that in the case at bar it saw fit to limit the application of the statute to employees working in a certain kind of establishment, does not make it class legislation. It is to be assumed that the Legislature knew what it was doing, and did what it did upon a fair appraisement of the facts and that, therefore, when it limited the application of the statute to employees working in or in connection with restaurants, it did so with a full appreciation of what it was doing.

It may well have considered that employees working in hotels on similar work, worked under different conditions and, indeed in many instances, worked within the very walls where their living quarters were.

It would be just as pertinent to say that the act of the Legislature forbidding night work for women in factories was unconstitutional because it did not forbid night work for women in establishments not falling within the category of factories and likewise, to say the same of the statute forbidding women to work in mercantile establishments after ten o'clock at night simply because there were numerous other establishments not within that classification where women worked and to which the law did not apply.

It is not class legislation *because it applies equally and with the same restrictions upon all who work in the same kind of employment and in the same kind of establishments.* The stigma of class legislation cannot even be held to apply upon the theory that the law is limited only to cities of

the first and second class. The case of the *People vs. Havnor*, 149 N. Y., 195, is well in point on the subject. The statute under consideration in the Havnor case went frankly, as far in the direction of so-called class legislation as any statute could and not be classed such. It forbade barbering on Sunday, except in New York and Saratoga Springs, in which places it was permitted until 1 p. m. Yet, though its constitutionality was attacked both on the ground that it was not such an exercise of the police powers of the state as was lawful and also from the angle that it violated the Fourteenth Amendment of the Constitution of the United States, in being an act of class legislation, it was sustained in full by the New York Court of Appeals. The entire case is one strongly in point upon matters involving the police powers and its reference thereto is full of interest. Upon this point, however, of class legislation, the court said:

> "The learned counsel for the defendant, however, criticises the act in question as class legislation, and claims that it is invalid under the Fourteenth Amendment to the Constitution of the United States, because it denies to barbers who do not reside in New York or Saratoga the equal protection of the laws. That amendment does not relate to territorial arrangements made for different portions of a state, nor to legislation which in carrying out a public purpose, is limited in its operation, but within the sphere of its operation

affects alike all persons similarly situated. (*Missouri vs. Lewis*, 101 U. S., 22, 30; *Barbier vs. Connolly*, 113 U. S., 27, 31). It was not designed to interfere with the exercise of police power of the state for the protection of health, or the preservation of morals. (*Powell vs. Pennslyvania*, 127 U. S., 678, 683). The statutes treats all barbers alike within the same localities for none can work on Sunday outside of New York or Saratoga, but all may work in those places until a certain hour. All are, therefore, treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. (*Hayes vs. Missouri*, 120 N. S. 68). As was said by the learned Appellate Division in deciding this case: (If the Legislature has power to regulate the observances and prevent the desecration of the Sabbath, it has power to say what acts in the different localities of the state it is necessary to prohibit to accomplish this purpose. It is quite conceivable that an act in one locality, thickly settled, should be prohibited which in sparsely settled districts of the State could be allowed, and for this reason an act might be objectionable in one district, but not in another. All of these regulations have in view the proper observance of the day, and are within the discretion of the Legislature.) We think that the statute violates no provision of either the Federal or State Constitutions, and that the judgment appealed from should, therefore, be affirmed."

While it is true there was a dissenting opinion in this case and the statute upheld by a divided court, nevertheless, the fact remains that the law was sustained.

The statute under consideration treats all women alike within the same occupation in the same establishments and within the same localities. That is exactly what the barbering statute did. The reasoning of the court in the Havnor case, therefore, is directly applicable to the case at bar.

The statute in question does not infringe upon the inhibitions of the Fourteenth Amendment of the Federal Constitution which forbids any state to deny to any person the equal protection of the laws. It does not violate the due process clause. It affects equally all women employed in restaurants in cities of the first and second class, as waitresses, dishwashers, cooks, etc. It affects all women workers in restaurants in such cities under like circumstances.

Chief Justice Taft said in *Truax vs. Corrigan*, 257 U. S., 376:

> "The Fourteenth Amendment, as this Court said in *Barbier vs. Connolly*, already cited, intended 'not only that there should be no arbitrary deprivation of life, liberty or arbitrary spoilation of property, but that equal protection and security should be given to all *under like circumstances*, in the employment of their personal and civil rights: * * * that no impediment should be interposed to

> the pursuits of any one except *as applied to the same pursuits by others under like circumstances;* that no greater burdens should be laid upon one than are laid upon others in the same calling and conditions.' "

This Court said in *Royster Guano Co. vs. Virginia,* 253 U. S., 415:

> "the classification must be reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that *all persons similarly circumstanced shall be treated alike.*"

In the case of *Adkins vs. Children's Hospital of the District of Columbia,* 261 U. S., 525, decided April, 1923, Chief Justice Taft in his dissenting opinion said:

> "The right of the Legislature under the Fifth and Fourteenth Amendments to limit the hours of employment on the score of the health of the employee, it seems to me has been firmly established. As to that, one would think, the line had been pricked out so that it has become a well formulated rule."

We respectfully call to the attention of the Court, the opinions in the Adkins case, and the Authorities therein cited, wherein said opinions analyze at length the police powers of the State

Legislatures in the regulation of the hours of employment of women. The Justices did not agree as to the constitutionality of the Minimum Wage Law there under review, but there was no difference of opinion as to the power of the legislature to regulate the hours of employment of women as proper health measures.

POINT II.

Wherefore, Defendant in Error respectfully submits that said Subdivision 3 of Section 161 of the New York Labor Law enacted by Chapter 535 of the New York Laws of 1917, brought by Writ of Error to the Supreme Court of the United States for its Review, be held to be a constitutional enactment, valid in all respects, and that the Judgment of Conviction in this action in the Courts of the State of New York be affirmed.

All of which is respectfully submitted.

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